

1 THE COURT: Counsel, you both agree that
2 numbers 58, who works for Troutman Sanders is excused
3 for cause?

4 MR. MERRITT: We do, Your Honor.

5 MR. McDONALD: Yes, Your Honor.

6 THE COURT: All right. Ladies and gentlemen,
7 now the clerk is going to draw by lot the names of
8 jurors, nine of you, who may sit as jurors in the
9 case. And then the process of exercising the
10 challenges will occur. When that happens, when that's
11 finished, the rest of you will be excused.

12 All right. Mr. Neal, call the jurors,
13 please.

14 THE CLERK: All right. Ladies and gentlemen
15 of the jury, as I call your name, please come forward
16 and have a seat in the jury box:

17 Juror No. 37, Joyce Marsh. Juror No. 12,
18 Kristen Caufield. Juror No. 60, Leanne Wight. Juror
19 No. 11, Rebecca Carter. Juror No. 50, Betty Raymond.
20 Juror No. 33, Gregory Kiersarsky. Juror No. 14, Jason
21 Chalmers. Juror No. 57, Marchelle Sossong. Juror No.
22 39, Linda Mitchell.

23 (Counsel exercising peremptory challenges.)

24 THE CLERK: Would the following jurors please
25 return to their seat in the courtroom:

1 Juror No. 11, Rebecca Carter, and Juror
2 No. 39, Linda Mitchell.

3 The following jurors please come forward and
4 have a seat in the jury box:

5 Juror No. 18, Richard Compber, and Juror No.
6 48, Philip Pollack.

7 THE COURT: Mr. Neal, what was the first one?

8 THE CLERK: The first one, Your Honor, was
9 No. 18, Richard Compber.

10 THE COURT: All right.

11 (Counsel exercising peremptory challenges.)

12 THE CLERK: Would the following juror please
13 return to his seat in the courtroom:

14 Juror No. 48, Philip Pollack.

15 And would the following juror please come
16 forward and have a seat in the jury box:

17 Juror No. 23, Carrie Emerson.

18 (Counsel exercising peremptory challenges.)

19 THE CLERK: May I swear the jury, Your Honor?

20 THE COURT: Please.

21 THE CLERK: Thank you. Ladies and gentlemen,
22 I'm going to ask you once again if you will please
23 stand, raise your right hand, and after the oath is
24 administered, if you will again please respond by
25 stating "I shall."

1 You shall well and truly try the issues
2 joined between the plaintiff, ePlus, Incorporated, and
3 the defendant, Lawson Software, Incorporated, the
4 defendant herein, and a true verdict render according
5 to the evidence, so help you, God?

6 THE JURY: I shall.

7 THE CLERK: Thank you. You may be seated.

8 THE COURT: Ladies and gentlemen, those of
9 you not selected nonetheless played a very important
10 role in the administration of justice in the Eastern
11 District of Virginia because without the services of
12 more than the nine who will sit we couldn't have the
13 jury selection system that we have envisioned in our
14 Constitution and our laws. And so we are grateful for
15 the time and commitment you have made this morning to
16 that end. And you are excused with our gratitude.

17 Thank you very much.

18 (Jurors not serving are discharged at this
19 time.)

20 THE COURT: Now, ladies and gentlemen, that
21 you've have been sworn, it's my responsibility to give
22 you some preliminary instructions about how we're
23 going to proceed. It is going to be your duty to find
24 from the evidence what the facts are. And you and you
25 alone indeed are the judges of the facts.

1 Then you will have to apply to the facts the
2 law as I instruct you at the end of the case, and you
3 are obligated to follow the law. Please note that
4 nothing that the Court says or does during the period
5 of the trial is intended to indicate in any way what
6 your verdict ought to be for that is your
7 responsibility and yours alone.

8 Now, the evidence from which you're going to
9 find the facts will consist of the testimony of
10 witnesses, of things that are received into evidence,
11 and any facts or exhibits that the lawyers stipulate
12 to.

13 There are certain important things that
14 happen during a trial but they are not evidence. For
15 example, the opening statements of the lawyers, when
16 they have an opportunity to give you a road map of the
17 case, to tell you what they think the evidence will
18 be. That's important because it will help you keep in
19 mind what's going on in the case and it will help you
20 follow the evidence. But what they say in those
21 opening statements is not the evidence. The evidence
22 comes from the witness stand, from the documents and
23 from the other things that are admitted into evidence
24 and the stipulations.

25 At the end of the case the lawyers have an

1 opportunity to make closing arguments. That's the
2 time when they have to tell you what they think has
3 been proved by the evidence and to explain to you why
4 they think you ought to return your verdict in favor
5 of their respective clients. And that's important
6 because it will help you synthesize the evidence, pull
7 it together, and understand each side's point of view.
8 But what they say in those closing arguments is not
9 the evidence. The evidence comes from that witness
10 stand, from the documents that are admitted, and the
11 other things that are stipulated to.

12 The questions that the lawyers ask, that's
13 not evidence. It's the answers that to the questions
14 that are evidence. Now, objections that the lawyers
15 make are not evidence either. They have been told not
16 to make what are called speaking objections and to
17 keep their objections short, so you shouldn't be
18 burdened with this, but sometimes it happens.

19 Whatever they say in those objections isn't
20 evidence, no matter what they say. That's the way
21 that they get rulings in the event they think the
22 other side is acting not in accord with the rules of
23 evidence or the rules of procedure. So don't get
24 upset with a lawyer or his or her client because they
25 make objections. They're just doing what they have to

1 do under the law to represent their client.

2 If a question is asked and it's objected to
3 and the objection is overruled, I'll simply say
4 "overruled." And then you'll hear the answer. And
5 you pay attention to the answer just like you would
6 any other answer.

7 If the question is asked and I sustain the
8 objection, I'll say "sustained," and you won't hear an
9 answer to that question. So forget about the question
10 and go on.

11 Any testimony that I tell you to disregard or
12 ignore or strike, you can't consider in your
13 deliberations.

14 Now, how, you say, does that happen? Most of
15 the time it happens this way: A lawyer is asking
16 questions of a witness on the stand, and the other
17 side has an objection, and before I can rule on the
18 objection and sometimes before the objection even gets
19 out of the lawyer's mouth, the witness has blurted out
20 the answer. And then I say, "Well, that objection
21 should be sustained," and I will turn to you and say,
22 "Ladies and gentlemen, don't pay my attention to that.
23 Disregard it." And we expect that in your
24 deliberations you will not take that testimony into
25 account in deciding your verdict.

1 Anything you have seen or heard outside the
2 courtroom is not evidence. And that's important for
3 these reasons:

4 First, it's the evidence that's put on in
5 this courtroom that all of you hear the same way. You
6 may not interpret it the same way, but at least you
7 have heard the same thing said.

8 Secondly, it's the evidence that's put on in
9 this courtroom that's tested by the rules or measured
10 by the rules of procedure and evidence.

11 And, thirdly, it's the testimony that's put
12 on in this courtroom that's tested by the
13 cross-examination of the side who is not putting on
14 the evidence, the other lawyers.

15 There are two kinds of evidence. There is
16 direct evidence and circumstantial evidence. Direct
17 evidence is direct proof of a fact such as testimony
18 of an eyewitness. Circumstantial evidence is proof of
19 facts from which you can infer or conclude that other
20 facts exist.

21 For example, let's suppose that it's
22 necessary to prove in the case that there was a human
23 being on an island. Nobody comes in and says I saw a
24 human being on the island, but somebody comes in and
25 says, "I saw what I think was a human footprint on the

1 island."

2 If you believe that what that witness saw was
3 a human footprint, you could infer, that's just making
4 a logical deduction, that there was a human being on
5 the island. That's circumstantial evidence. I'll
6 give you further instructions about that at the end of
7 the case.

8 Now, it's going to be up to you to decide
9 what witnesses to believe and what witnesses not to
10 believe. You can believe all the witness' testimony,
11 none of the witness' testimony or part of a witness'
12 testimony. It's up to you.

13 When you do that, just remember this: Every
14 day you make judgments about the credibility of
15 witnesses. You decide whether somebody is telling you
16 the truth or not, don't you?

17 How do you do that? Well, first you look at
18 how they are talking, what they do and say while they
19 are telling something. Then you assess does what the
20 person is saying make sense. Do they seem to have had
21 an opportunity to have seen what they are talking
22 about or to know what they are talking about? Are
23 they affected by what they are telling me? And in the
24 case of a witness, is a witness affected somehow by
25 the outcome of the case? Is a witness aligned with

1 one party or the other? Does it make sense what this
2 witness is saying when considered in perspective of
3 all the other evidence in the case?

4 Those are things you take into account in
5 deciding whether to believe somebody's testimony,
6 accept it in whole or in part. And you apply that to
7 the testimony of fact witnesses and expert witnesses.
8 There are some expert witnesses in this case.
9 Basically, you judge their testimony just like you do
10 anybody else's testimony. You can accept it or reject
11 it in whole or in part just as you feel like you need
12 to. I'll give you some further instructions on that
13 at the time that the case is over and you have to
14 decide the case.

15 But keep in mind that it's your
16 responsibility whether to accept as accurate what a
17 witness is telling you or not.

18 Now, you're going to be permitted to take
19 notes. You'll each have a notebook. It has some
20 things in it already. It has places for you to take
21 notes in it, and it's all right for you to do that.

22 At the end of the trial, your notes will be
23 taken up, tore up and thrown away. Those not are for
24 your individual uses. You can't even in deliberation
25 show them to another juror.

1 And although I know you wouldn't do this, I'm
2 required to tell you, you can't say back in
3 deliberations, Well, I know I'm right about this
4 because I have better notes than you do. There are
5 some people who better remember things without taking
6 notes, and that's all right.

7 You don't have to take notes, but you can.
8 But when you're taking notes, don't get so tied up in
9 taking notes that you forget to eyeball, as my
10 colleague Judge Williams says, keep an eye on the way
11 the witness is appearing when the witness is
12 testifying to you because that's in part how you make
13 your credibility determination.

14 Now, unlike what you may have seen on
15 television or heard, we don't have the capacity to
16 read back to you the testimony or to send the
17 transcript back to you in the jury room. So you're
18 going to have to decide on what you remember what's
19 right. And that's what you have to do.

20 Now, some of you, I don't know who actually
21 of the panel actually has been a juror before, but if
22 you have been a juror in a criminal case, this is
23 different than a criminal case. This is a civil case.
24 The case involves the proof of infringement, and it's
25 the responsibility of ePlus to prove infringement.

1 And ePlus has to prove infringement by what's called a
2 preponderance of the evidence, which is more likely
3 than not that something is true.

4 There's also a defense of invalidity. And
5 invalidity has to be proved by Lawson. And
6 invalidity, I'll tell you more about later, but they
7 have the burden of proving that by clear and
8 convincing evidence. And I'll tell you more about
9 that later.

10 You should just be listening to the testimony
11 and keeping it all in mind. Now, remember, at the end
12 of the trial you're going to hear the closing
13 arguments and you're going to get instructions, and
14 then you'll have plenty of time to deliberate your
15 verdict. And so what I'm going to ask you to do is
16 not to be deciding the case every time you go back in
17 there for a recess or have lunch or waiting for the
18 next day's session while you're having the coffee and
19 bagels we're going to give to you. Just don't
20 deliberate the case until you get all the evidence in.
21 You'll have plenty of time to do it then.

22 Now, please don't discuss this case with
23 anyone, even your family. And don't discuss it with
24 anybody here. Now, you might be going to the
25 cafeteria at the same time some of these people in the

1 case are. If you hear something or one of them tries
2 to talk to you, you need to let me know. I don't
3 think that will happen, but sometimes it does happen
4 with people in the elevator and they are careless
5 about who else is in the elevator, and they'll say
6 something. And if it concerns the case, you need to
7 let me know and say, Judge, I heard this in the
8 elevator. Then I have some things I need to do and
9 I'll not go into all that now.

10 Don't do any research on your own. And in
11 the days of computers at home and so much in the way
12 of information that's available, just remember if you
13 want to use your computer at home tonight, you can go
14 Google or do whatever you want to do, but don't be
15 looking up any of the terms or any of the people.
16 Don't be looking up any of the lawyers or the law
17 firms or anything else. Don't do any research about
18 the case because you need to confine your efforts and
19 make your decision on what you hear in the courtroom
20 to what you hear in the courtroom.

21 And I think we're going to hear the opening
22 statements of the lawyers in just a minute. And then
23 we'll hear testimony. And after that happens, you'll
24 hear the closing arguments and the instructions.

25 There will come times when I have to talk to

1 the lawyers privately, and one of those times will be
2 now. And I'm going to excuse you while that happens.
3 Or I'm going to come up here and turn on that dreaded
4 white noise and let you be irritated while I talk with
5 them. They know to minimize the number of instances
6 when I have to do that so that we don't get into the
7 situation such as in the famous criminal trial that
8 occurred many years ago in California where they did
9 nothing but have side bar conferences, and the jury
10 felt like it was really out of the case. So we're not
11 going to have that here.

12 All right. Basically, what we're going to do is
13 we're going to -- I'm going to hear something from the
14 lawyers, and you're going to come back and hear
15 opening statements. And about one o'clock we'll take
16 a lunch break. We'll go until sometime between five
17 and six in the afternoon. We'll take a little break
18 in the afternoon. We'll come back tomorrow. I'm
19 going to look and see where you live.

20 Does anybody live a long distance away? Does
21 anybody have a long drive in the morning?

22 A JUROR: Fredericksburg.

23 THE COURT: Well, that can be long or not
24 depending on who's driving whom on Interstate in 5
25 South. We'll probably start around nine o'clock in

1 sessions from now on.

2 There will not be a hearing of any evidence
3 on next Monday, January 10. We'll be off for that. I
4 haven't decided whether we'll be off for January 17,
5 which is a federal holiday. I think it's a state
6 holiday, too. And so I haven't decided that. That
7 kind of depends on where we are in the case.

8 And so now if you will go with Mr. Langford,
9 I have some business to take up with the lawyers. And
10 he will let you make phone calls and tell people
11 what's happened in your life.

12 Mr. Neal, you order them lunch. You-all may
13 remain seated while the jury is being excused, please.

14 (Jury out.)

15 THE COURT: All right. Now, I got this email
16 from Mr. Strapp yesterday. I don't understand what
17 it's about. Can somebody tell me what the objection
18 to whatever Lawson is going to do in opening statement
19 is?

20 MR. ROBERTSON: Yes, Your Honor. Thank you.

21 This issue was raised with Your Honor on at
22 least two occasions before. The first being at that
23 time Markman hearing.

24 THE COURT: But what is the issue? I don't
25 understand it.

1 MR. ROBERTSON: The issue is that the
2 defendant has injected this "published by a vendor"
3 into the claim construction.

4 THE COURT: What does it say in the claim?

5 MR. ROBERTSON: Well, it's the construction
6 of the term "catalog." If Your Honor would like me to
7 --

8 THE COURT: No. What does it say in the
9 claim? What's the claim language?

10 MR. ROBERTSON: Just catalog or product
11 catalog.

12 THE COURT: No. That isn't what it says. I
13 don't have the claim construction documents here.
14 Does anybody have a set of what you're giving the
15 jurors?

16 MR. ROBERTSON: Yes, Mr. Neal has all the
17 copies.

18 THE COURT: Let me see what you're giving the
19 jury.

20 THE CLERK: Yes, sir.

21 THE COURT: And it has the patents in it,
22 right?

23 MR. ROBERTSON: Yes, sir. If you want to --

24 THE COURT: What tab is the claim
25 construction?

1 MR. ROBERTSON: Tab 6, Your Honor.

2 THE COURT: Where is the catalog?

3 MR. ROBERTSON: It's the first claim term.

4 THE COURT: Okay. I see. All right.

5 MR. ROBERTSON: So the issue here, Your Honor
6 is --

7 THE COURT: Well, the claim construction has
8 "published by a vendor" in it.

9 MR. ROBERTSON: I understand. And what they
10 want to do now, Your Honor, is use that as a vessel to
11 imbue further construction into what published by a
12 vendor means.

13 Dr. Shamos, their expert, has suggested that
14 "published by a vendor" means you have to have the
15 entire catalog with all its information, not any
16 subsets, nothing. That it would be just as if a paper
17 catalog was made into an electronic catalog.

18 What "catalog" was intended to mean, what
19 Your Honor construed it, is that it has to have
20 certain vendor information.

21 THE COURT: You-all did not ask me to
22 construe "published," did you?

23 MR. ROBERTSON: No, sir.

24 THE COURT: "Published" doesn't have any
25 meaning other than its normal and ordinary meaning,

1 does it?

2 MR. ROBERTSON: I think you even suggested at
3 the pretrial conference. Your Honor. That
4 "published" simply meant it could be writing or
5 verbally. Writing could even be electronic. And it
6 simply had to be information that was supplied by the
7 vendor. That's all we're looking for. We don't think
8 published means --

9 THE COURT: What reason do you have to
10 believe that they're going to disobey what I've ruled?

11 MR. ROBERTSON: Because --

12 THE COURT: Have they told you they are going
13 to argue that or what?

14 MR. ROBERTSON: Well, they have argued that
15 in one of their slides, Your Honor, that we find to be
16 contrary to the Court's construction.

17 THE COURT: Which slide are you talking
18 about?

19 MR. ROBERTSON: They are not numbered, Your
20 Honor. It's the one that says, Evidence. Lawson
21 systems. It's very different. That's the first one.

22 THE COURT: Well, all it says --

23 MR. ROBERTSON: The suggestion, if I might,
24 Your Honor, is going to be that a Lawson customer can
25 take data, information, such as defined in your

1 definition of a catalog, which includes preferably, a
2 part number, a price, a catalog number, vendor name,
3 vendor ID, etc. And the customer of Lawson can select
4 from the vendor that it wants to include that
5 information.

6 Now, the source of that information, of
7 course, is the vendor. The vendor comes up with the
8 part number, not the customer. The vendor comes up
9 with the pricing, not the customer. All of that is
10 the source of this information that Your Honor defined
11 what a catalog is, is an organized collection of
12 preferably including that information.

13 What they are now suggesting and what they
14 want to imbue the word "published" with instead of
15 what I think Your Honor just intended, that being
16 somehow this information is being supplied by a
17 vendor, and they are the source of that information.

18 They are suggesting now that --

19 THE COURT: I don't understand what the
20 dispute is. There's nothing on the face of the slide
21 that does what you think.

22 MR. ROBERTSON: It says Lawson Software uses
23 a customer selected list, not multiple published
24 catalogs.

25 THE COURT: Are you objecting to "multiple"

1 or --

2 MR. ROBERTSON: I'm objecting to the
3 suggestion that when Lawson's customers selects the
4 information you defined to be an organized list of the
5 catalog, that somehow renders it no longer a catalog.
6 That's the argument that was been made and advanced by
7 Dr. Shamos in his expert report and his deposition.
8 And that, I think, is reading into your construction
9 something that was never intended to be read into your
10 construction.

11 THE COURT: All right. Well, let me hear
12 from them.

13 MR. ROBERTSON: I'm sorry. Just one last
14 point. When we raised this at the pretrial, you
15 actually asked Ms. Stoll-DeBell whether or not you
16 intended a "gotcha," which is how the Court phrased
17 it, and her response was, Exactly. We did intend a
18 gotcha as a non-infringement argument.

19 MS. STOLL-DeBELL: Your Honor, I wanted to
20 hand up a couple copies of documents, if you don't
21 mind.

22 THE COURT: Well, I'm going to tell you
23 something. You can use exactly what I used in
24 catalog/product catalog. That's what you can use.
25 The definition of "catalog" is an organized collection

1 of items and associated information, published by a
2 vendor, which includes suppliers, manufacturers, and
3 distributors, which preferably includes a part number,
4 price, catalog number, vendor name, vendor ID, a
5 textual description of the item, and nothing else.

6 MS. STOLL-DeBELL: Your Honor, we have that
7 exact definition as one of the slides they objected
8 to. It is a quote of your claim construction of the
9 term "catalog." That is what we intend to use. We
10 intend to put on a non-infringement case that our
11 product does not meet this definition. That is our
12 non-infringement case. We've said this all along.

13 Mr. McDonald said it at the Markman hearing
14 that we didn't have catalogs. We have like a shopping
15 list for the grocery store, not a published catalog.
16 We said it in our non-infringement interrogatory
17 contentions. We don't have published catalogs.

18 Dr. Shamus said it in his expert report. We
19 don't have published catalogs.

20 THE COURT: I didn't say "published
21 catalogs." I decided a collection of items and
22 associated information published by a vendor. That's
23 different than saying it's a published catalog. And
24 you can't say "published catalog" with a view to
25 conveying the notion that you have the Sears catalog,

1 and that's what we're talking about or anything else.

2 MS. STOLL-DeBELL: And I apologize. I
3 misspoke, Your Honor. If you look at our slides, we
4 say we do not have catalogs published by a vendor.
5 This is another slide that they used. That's what
6 Dr. Shamos used in his report. That exact language.
7 We don't have catalogs published by a vendor.

8 THE COURT: You have Lawson does not infringe
9 the ePlus patents?

10 MS. STOLL-DeBELL: Yes. And I can give you
11 the paragraph of Dr. Shamos' report. I can cite you
12 to of our interrogatory responses where we said we do
13 not have catalogs published by vendors. We do not
14 have multiple catalogs. We are arguing that we do not
15 meet your definition of "catalog."

16 THE COURT: I didn't say it had to be
17 multiple catalogs. I said it has to be an organized
18 collection of items and associated information. That
19 doesn't say "catalogs."

20 MS. STOLL-DeBELL: The claims do. The claims
21 call for a collection of catalogs, two or more
22 catalogs, Your Honor. So you're right. Your
23 definition is for a single catalog. If you look at
24 the claim language, it actually calls for more than
25 one.

1 THE COURT: All right. Thank you.

2 I don't understand, Mr. Robertson, where they
3 are going across the line. I really don't.

4 MR. ROBERTSON: I'd like to just point out
5 the very same slide that was just mentioned by Ms.
6 Stoll-DeBell Lawson does not infringe the ePlus
7 patent, says "Lawson does not have published
8 catalogs."

9 THE COURT: Yeah. And they're not going to
10 say that. They're not saying that.

11 MR. ROBERTSON: Then I would expect this
12 slide wouldn't be included.

13 THE COURT: No. I just told them. I said
14 they are not saying that. They are saying what I
15 said, and that's it.

16 MR. ROBERTSON: Thank you, Your Honor.

17 THE COURT: And the other thing that we're
18 doing to do is we're not going to have the closing
19 argument in the opening statements. I don't want you
20 getting into arguments about why people are wrong in
21 making closing statements and what's wrong with the
22 expert testimony. You can frame the issues in what
23 your expert is going to do.

24 The other thing is -- yes, Ms. Stoll-DeBell,
25 what else?

1 MS. STOLL-DeBELL: I'm sorry. We will not
2 say "published catalogs," but we do intend to argue
3 and we have disclosed all throughout this case, that
4 our product is not published. It's not published at
5 all and is not published by a vendor.

6 THE COURT: Well, you have to come up with
7 some definition of "published" that doesn't include
8 the written or the spoken word because that's what
9 I've said it belongs to.

10 I'm telling you, I want it understood --
11 whether I'm right or wrong, I don't know. I think I'm
12 right in the way I interpreted it. But I spent a lot
13 of time and effort, and so did you-all, in giving the
14 terms the meaning I thought they had. And that's
15 going to be the terms that are going to be used. And
16 no amount of workaround is going to happen.

17 And the consequence of a workaround is going
18 to be this: If I find that you are just -- and I've
19 had this problem. I've never had to say this before.
20 But if I find any more of what I've encountered, which
21 is trying to do indirectly what I've said you can't do
22 directly, and I'm not talking about you personally,
23 I'm talking about your side, then the consequence is
24 going to be is I'm inclined to grant a motion for
25 judgment as a matter of law for the other side on the

1 theory that that's an appropriate sanction for
2 repeated disobedience of the Court's directives
3 because I can't conduct a trial being constantly on
4 the concern that somebody is trying to come in the
5 back door.

6 Now, if I did it wrong, you-all have recourse
7 to that in the federal circuit, and that's fine, but I
8 want you to understand I don't deal with things that
9 way.

10 MS. STOLL-DeBELL: I understand, Your Honor,
11 and I would like to remind you this came up at the
12 pretrial conference as well. We have not taken issue
13 with the meaning of the term "published." Dr. Weaver
14 has said that published means originated, and we
15 intend to cross-examine him on that. I asked him
16 about it in his deposition. And Dr. Shamos gave a
17 rebuttal report that "published" does not mean
18 originated.

19 THE COURT: I don't care what the experts
20 say. It's what the Court says that's the issue and
21 you-all didn't call upon me to determine the meaning
22 of "published." Now, it's not unheard of that courts
23 have to make claim construction interpretations during
24 the trial.

25 I haven't gone back, I think I did this once

1 before, and looked at the ordinary meaning of the word
2 "published" in the dictionary, and that's what we're
3 going to use because nobody has taken the view that
4 "published" means anything other than what it means.

5 MS. STOLL-DeBELL: It is our position it has
6 the ordinary meaning, too, Your Honor. To the extent
7 that Dr. Weaver says it doesn't, we intend to
8 cross-examine him on that.

9 THE COURT: You sure can.

10 MS. STOLL-DeBELL: Okay.

11 THE COURT: And that's fine.

12 Anything else on that point?

13 MS. STOLL-DeBELL: I don't think so.

14 THE COURT: You modify your slides
15 accordingly.

16 Now, let's keep in mind the order of things.
17 It's ePlus' responsibility to prove infringement, and
18 cross-examination on infringement is not a time to
19 develop invalidity. I'm not going to hear that that
20 way. I want it all clean, all the evidence cleanly,
21 crisply and organizedly presented on the issue of
22 infringement.

23 If you need to call witnesses back to talk to
24 them about invalidity, you can do that. Any witness
25 who is here and whose testimony you need, you can have

1 back. But I don't want, and I think I've told you
2 this before, but some of the things that have been
3 said recently suggest to me that maybe you-all
4 contemplate a commingling. And I don't want a
5 commingling.

6 That way the Rule 50 issues are very cleanly
7 and crisply dealt with, the record is as it needs to
8 be, and it will be easier for the jury to understand
9 what happens when I tell them that preponderance of
10 the evidence is how they have to decide infringement.
11 And clear and convincing evidence is how they have to
12 decide invalidity. All right.

13 MR. ROBERTSON: Your Honor, may I briefly
14 address that? I want to make sure I don't run afoul
15 of Your Honor's ruling.

16 THE COURT: Why are you dealing with
17 invalidity? Don't you anticipate. You can't
18 anticipate and start trying your response to
19 invalidity in the early days of the case because your
20 foot is then off base. Does that make it clear?

21 MR. ROBERTSON: It does, but let me just
22 raise the context of this, Your Honor. The inventors
23 are going to come forward and tell how they developed
24 their invention. That is the subject matter of these
25 patents. Part of it is a development of a system that

1 they are also the inventors on, at least two of the
2 three inventors were inventors on, and they are going
3 to say how in part they took that system and made
4 changes and modifications to solve problems that are
5 the subject matter of the patents that have to be
6 addressed here.

7 THE COURT: Well, that goes to the issue of
8 whether it's new and useful.

9 MR. ROBERTSON: Well, it goes to the issue of
10 what the inventors actually invented and how they went
11 around solving a problem. Solving a problem is really
12 what invention is all about. I've never been involved
13 in a patent case where the inventors couldn't come
14 forward and say --

15 THE COURT: Mr. Robertson, I made a clear
16 statement, and you stay within those bounds. And
17 you're smart enough to figure out how to ask those
18 questions that way. If what you're trying to do is
19 somehow use the inventors in anticipation of an
20 invalidity defense, you can't do that. You can bring
21 them back and you can put on that testimony after he's
22 put on invalidity evidence.

23 Now, that's the way cases are tried, patent
24 or otherwise. You have the burden, you have an issue,
25 and you have got to prove it, and you're staying

1 within that. That rule has been the same in this
2 court for as long as I can remember. And I don't
3 understand what you're saying to be anything that's
4 improper for you to put on in infringement. But the
5 mere fact that you got up here and felt like it was
6 appropriate to do that suggests to me that you want
7 some kind of exemption. And I'm not going to have it.
8 It's that simple. I tried to make it clear to you
9 all.

10 MR. ROBERTSON: I understand, sir. It's just
11 going to be -- I'm --

12 THE COURT: Bring them back. If they are
13 going to trench on a topic that's infringement.

14 MR. ROBERTSON: I will bring them back.

15 THE COURT: I mean invalidity.

16 MR. ROBERTSON: I just wanted to make the
17 simple point, Your Honor, that it's almost -- it's
18 going to be very difficult to tell the story of
19 invention if I can't tell where they got to from where
20 they were. What were they doing --

21 THE COURT: You can do that, but I'm telling
22 you it's how you ask the questions. And you get paid
23 a God-awful amount of money to know how to ask the
24 questions. Now do it right.

25 MR. ROBERTSON: All right.

1 THE COURT: That's not precluded by what I've
2 said, but the fact that you felt necessary to get up
3 and articulate that it was a problem on that topic
4 gives me problems.

5 MR. ROBERTSON: I apologize, Your Honor. I
6 am still a little confused.

7 THE COURT: Well, get unconfessed.

8 MR. ROBERTSON: I will try to make sure I
9 stay within the boundaries of the Court.

10 THE COURT: Then we'll have to deal with any
11 objections that come up. I don't know that they will
12 come up.

13 Are you all ready to give your opening
14 statements?

15 MR. ROBERTSON: Your Honor, I'd prefer not to
16 have to break on my opening statement.

17 THE COURT: I would, too.

18 MR. ROBERTSON: During the lunch break.

19 THE CLERK: The lunches won't be here before
20 one o'clock.

21 MR. ROBERTSON: I've gone through mine, Your
22 Honor. It's going to be about an hour. I'm going to
23 try and keep it under that, but that's where I am.

24 THE COURT: Well, maybe we can break at
25 2 o'clock. It will take an hour for it to be here?

1 THE CLERK: Yes. It might be 1:30. I'll
2 check on it.

3 THE COURT: All right. Maybe we need to send
4 somebody over there to get it.

5 THE CLERK: I'll take care of the details
6 while he's opening.

7 THE COURT: Are you ready?

8 MR. McDONALD: We just need to fix the slide
9 that you mentioned, Your Honor.

10 THE COURT: You will be able to do that
11 during the lunch break because you're not going to be
12 doing anything.

13 All right. Let's get them back in.

14 THE CLERK: Are you all going to be using the
15 evidence system during opening?

16 MR. McDONALD: Yes.

17 THE COURT: By the way, let Mr. Langford move
18 this lectern for you. The thing is cantankerous.

19 (The jury is present.)

20 THE COURT: Ladies and gentlemen, because of
21 the situation, I think what we'll do is your lunches
22 are coming in. We'll go ahead and have the opening
23 statements and we'll break around 2 o'clock. Is
24 everybody all right with that? Can you live through
25 that? Everybody okay? If you're not, let me know.

1 Let's go. You'll hear the opening statement
2 of Mr. Robertson for ePlus now.

3 MR. ROBERTSON: Thank you, Your Honor.

4 May it please the Court, ladies and gentlemen
5 of the jury, my name Scott Robertson, and I represent
6 the plaintiff here, ePlus, who's the owner of the
7 patents. And just let me reiterate what the Judge
8 said earlier this morning. We all certainly do
9 appreciate your public service here.

10 If I might briefly, because it's been a long
11 morning and now it's early afternoon, introduce my
12 colleagues again who are with me.

13 At counsel table, it's Jennifer Albert, whose
14 with the firm of Goodwin Procter. Craig Merritt, who
15 is with the law firm of Christian Barton. Michael
16 Strapp with the law firm of Goodwin Procter. And Mike
17 Greer, who's going to be our techno consultant helping
18 us present some of the evidence to you today.

19 And so with that, Mike, could I have that
20 first slide?

21 On the monitors in front of you, you'll see
22 some of the key witnesses who are going to be
23 testifying here during the trial. Ken Farber is the
24 president of ePlus Systems and ePlus Content Services.
25 Mr. Farber is actually sitting in the courtroom over

1 here. He will be our client representative throughout
2 this trial. Mr. Farber will testify later concerning
3 the product lines that he sells, the software that
4 ePlus sells into the marketplace to provide business
5 solutions including the software that we're going to
6 be talking about that helps perform what's known as
7 electronic sourcing or electronic procurement that are
8 the subject matter of this case and the subject matter
9 of the patents.

10 Mr. Farber was at a company called ProcureNet
11 back in 2001. And ePlus acquired the assets of that
12 company along with these patents.

13 Also in the courtroom is the chief financial
14 officer of ePlus, Elaine Marion. And Ms. Marion will
15 tell you a little bit about ePlus and its business
16 headquartered here in Herndon, Virginia.

17 If I might, Your Honor, it might be helpful
18 if we could pass out the juror notebooks that Your
19 Honor had requested the parties make because I may be
20 referring to some of those.

21 THE COURT: Here they are, Mr. Langford.

22 In the back of those notebooks, there's some
23 space for taking notes if you want to use those. And
24 you also have notepads, I believe. So you can do it
25 either place. You can take them in the notepad or you

1 can take them in the back.

2 MR. ROBERTSON: If I might just perhaps
3 briefly orient you to this notebook that the Judge
4 asked us to prepare, you'll note that there's an index
5 in the beginning.

6 THE CLERK: Mr. Robertson, would you pull
7 that mike toward you a little bit.

8 MR. ROBERTSON: Yes, thank you, Mr. Neal.
9 I'll move the notebook up here.

10 So there are seven tabs. We don't need to go
11 through it all right now in detail, but I just wanted
12 to point out to you that under tab 1 was that sample
13 patent that was referred to this morning in that
14 videotape that we all saw about the patent system.
15 And I might use that during this opening to make some
16 points or examples with respect to how your task is
17 going to be to understand the issues that are raised
18 in this case with respect to both infringement and
19 invalidity.

20 Tab 2 is the first patent that my client was
21 awarded, which the Judge indicated we'd be referring
22 to it by the last three digits, the '683.

23 Under tab 3 you'll see the second patent that
24 my client was awarded, which we'll be referring to, as
25 the Judge indicated, as the '516 patent.

1 And under tab 4 is the final patent that's at
2 issue here, which we'll be referring to, as the Judge
3 indicated, as the '172 patent.

4 Under tab 5 there are a number of terms.
5 They are actually not terms of the patents but terms
6 that might assist you in understanding some of the
7 issues that are going to come up as we discuss them
8 during the course of this case.

9 Under tab 6, as Judge Payne indicated this
10 morning, this includes a glossary of claim terms that
11 were in dispute between the two parties. That is, in
12 dispute between ePlus and the defendant Lawson. And
13 the Judge has construed those claims. He has
14 interpreted them for you. You will see these terms as
15 we go through some of the claims that are at issue in
16 this case with both respect to the issue of
17 infringement and validity. And as the Court noted
18 this morning, you're to follow these constructions,
19 these interpretations, and no others in your task to
20 determine whether infringement of my client's patents
21 is present or whether Lawson has established that the
22 claims are invalid.

23 Let me introduce some other key witnesses
24 that you're going to be hearing from in this trial.
25 You're going to be hearing from the inventors of the

1 patents-in-suit here. There are three inventors that
2 are still living. One is now deceased. The first is
3 Douglas Momyer. The second is James Johnson. And the
4 third is Robert Kinross.

5 They are all here now and they're all going
6 to be testifying. I think we'll at least get to
7 Mr. Momyer this afternoon, and we'll be following up
8 with the others later.

9 These three inventors were employed by a
10 company called Fisher-Scientific back in 1994.
11 Fisher-Scientific was the employer at the time when
12 these gentlemen who worked in the information
13 technology department came up with the inventions that
14 are the subject matter of these three patents. I'll
15 tell you more about Fisher-Scientific, their story,
16 and their invention in a few minutes.

17 One of the witnesses you're going to hear
18 among several experts that are going to testify at
19 this trial is Dr. Weaver. Dr. Weaver is a professor
20 of computer science at the University of Virginia. He
21 has studied these patents extensively. In fact, he
22 has testified on a few occasions before as an expert
23 on these patents in federal court here in Virginia.

24 He has also studied Lawson's infringing
25 software systems that are at issue here, and he has

1 looked at in his role in rendering opinions with
2 respect to infringement and certain validity issues,
3 he has looked at evidence that has been produced
4 during the course of these pretrial proceedings under
5 the Court's rules.

6 That will include documents that have been
7 produced by Lawson. There will be manuals. There
8 will be other guides. There will be sworn testimony
9 of the witnesses that were taken in preparation of
10 this trial. And Dr. Weaver will actually put on
11 several demonstrations of the Lawson software at issue
12 in this case, and he'll show you why in his opinion
13 that that software infringes the claims that are being
14 asserted in this case.

15 You're going to hear more about the Lawson
16 products in a minute. For now I'm going to be
17 referring to it, as the Judge indicated, as either the
18 Lawson accused product and methods or the Lawson S3
19 system. You'll probably be hearing that a lot in this
20 case.

21 So what is this software system we're talking
22 about? What you're going to be hearing during the
23 course of the evidence is that it can be made up of
24 what are called several software programs or modules.
25 What these are really like are building blocks that

1 are put together, software building blocks, in order
2 to perform all the functionality that are the subject
3 matter of the claims that are at issue here.

4 So Dr. Weaver will provide detailed testimony
5 applying those claims at issue in this case to the
6 accused Lawson computer software.

7 In addition, you'll be hearing from a
8 Mr. Patrick Niemeyer. Mr. Niemeyer is the founder of
9 the company called Pat Niemeyer Consultants. He's an
10 expert in source code and source code languages. And
11 he wrote one of the leading treatises on that subject.

12 Again, during the course of the pretrial
13 proceedings under the Court's rules, ePlus obtained
14 copies of the accused S3 source code. And
15 Mr. Niemeyer studied that source code, and he
16 interpreted it so he could offer opinions as to how to
17 understand it. And he provided that information to
18 Dr. Weaver, who relied on his analysis to confirm his
19 opinions with respect to infringement.

20 You're also going to be hearing from
21 Mr. Brooks Hilliard, who's president of Business
22 Automation Associates. He'll be addressing most of
23 Lawson's arguments concerning the validity of the
24 patents. Mr. Hilliard has 30 years' experience in the
25 subject matter of electronic procurement or electronic

1 sourcing. And he will be addressing what the Court
2 and what the video described earlier this morning as
3 prior art.

4 There will be several other Lawson employees
5 who we'll call as witnesses. We'll call them as what
6 is known as adverse witnesses because they are not
7 under our control. They are, in fact, employees of
8 Lawson. But we've taken their depositions during the
9 course of this pretrial proceedings, that is, we've
10 taken their sworn testimony under oath, and we think
11 during the course of that sworn testimony they have
12 made several admissions that we think assist in our
13 burden to prove infringement.

14 And we'll also be calling some of Lawson's
15 customers. Those customers have the S3 accused
16 software. They use it. We have taken their
17 depositions. Again, they have been videotaped. You
18 may be seeing some of those depositions by videotape.
19 We'll try to keep that to a minimum because that's not
20 the most scintillating testimony, I know.

21 So what are we talking about here with these
22 patents? If we could just go to PX1, the '683 patent.
23 It's in your notebook under tab 2, but I think I can
24 bring it up on your screen and have you focused on it
25 a little bit.

1 You you'll see that the title is electronic
2 sourcing system and method. So that's going to be
3 important. It includes what are known as system
4 claims and method claims. The patent was issued in
5 February of 2008. What you'll see is it was filed
6 August 10 of 1994.

7 Now, why is that important? Well, this
8 invention relates back to a conception for a computer
9 software system in 1994 for conducting what I will
10 call a complete shopping experience, which include the
11 ability to select catalogs from multiple vendors,
12 perhaps five, ten, dozens, hundreds. It's unlimited
13 really in any sense as long as you can load these
14 multiple vendor catalogs into a database that can be
15 searched.

16 Once you have the vendor catalogs loaded, you
17 can search and browse these catalogs. You can even
18 over a network such as the Internet browse catalogs
19 online, build requisitions using those search results,
20 and then generate multiple purchase orders to various
21 vendors. And you can do this all from a desktop
22 computer, PC or a laptop. It's all automated and
23 electronic.

24 Now, why is it important? Well, it's
25 important because this happened back in 1994, and

1 these patents are still valid, and presumed valid, as
2 the Court indicated to you this morning, and they
3 didn't have an expiration date for another five,
4 actually even six years, which is quite remarkable
5 when you look back to technology that was created in
6 1994 and is still vibrant, alive, and being used
7 today. In this case actually it's been enormously
8 successful because there are dozens of companies out
9 there now that employ this kind of technology.

10 So if I could just emphasize a few points
11 from that videotape that we saw this morning. I don't
12 want to go over it again, but I think this is
13 appropriate. I'd like to put it in the context of
14 these patents if I could.

15 Patents are different from other ways to try
16 and protect what are your ideas or your inventions or
17 it's often known as intellectual property. You have
18 probably heard of trade secrets like the famous one is
19 the formula or the recipe for Coca-Cola. You can
20 maintain that as a trade secret. Why? Because it's
21 difficult sometimes to reverse engineer. There's
22 nothing improper about it. And it might be the best
23 way to protect that kind of intellectual property. Or
24 you can obtain a patent as the video indicated is a
25 limited right to exclude others from practicing your

1 inventions or from making products that are covered by
2 their patents.

3 And as the video indicated, and I believe the
4 Court emphasized, typically now those patents are
5 valid for 20 years from the filing of the application.
6 So why do people do that? Why do people obtain
7 patents? Why were they obtained in this situation?
8 Well, you probably heard the expression "We want to
9 build a better mousetrap."

10 So how does that happen? What is required
11 under the patent system is that you disclose to the
12 world in this detailed description, as you're going to
13 see in these patents, exactly what your invention is
14 and how you make and use it.

15 And then typically, with the assistance of a
16 patent attorney, you draft what are called claims.
17 And these claims help define the invention. And you
18 will see when you look at these three patents that
19 were at issue here, there are more than 79 claims that
20 the Patent Office has allowed.

21 Now, the Court has asked us and in order to
22 focus this case and the parties agreed that we would
23 focus on 12 representative claims in these patents.
24 So there will only be 12, thankfully, out of 79 that
25 we will need to address. But those claims are what

1 will define the invention. Those claims are what you
2 need to look at when you're making determinations both
3 as to the infringement by the Lawson software and by
4 validity based on the arguments they are going to
5 raise with respect to that.

6 Now, I want to talk a little bit in the
7 context of these patents about some of these different
8 terms you have heard about what are called product or
9 system claims or method claims or even improvements.
10 And I thought it was particularly appropriate that
11 this case is here in Richmond, Virginia, because I'm
12 sure that everybody knows Thomas Jefferson was the
13 third president of the United States and governor of
14 Virginia during the Revolutionary War, but few people
15 know that he was the first secretary of state under
16 George Washington.

17 And when Congress, the first Congress that
18 ever sat after the Constitution was ratified, one of
19 the first acts they passed because it was so important
20 was the Patent Act of 1790. And under that act,
21 Jefferson, as secretary of state, was the head of a
22 three board panel that consisted of the entire patent
23 board at the time. They were the Patent Office.

24 It included Jefferson, as secretary of state,
25 the secretary of war and the attorney general. And

1 they would meet the fourth Saturday of every month and
2 they would review the applications, a responsibility
3 that Jefferson particularly enjoyed because he liked
4 to look at all the little models that had to be filed
5 along with the applications.

6 And the first patent ever granted by this
7 board, which took two of the three members to agree
8 upon, was for a patent directed to improvement on the
9 method of making potash by a new apparatus and
10 process. And that was in 1790.

11 Now, why do I raise that? Why is that
12 significant? First, it raises some interesting
13 points. First, individuals can obtain patents for
14 improvements. That is, in a sense, that was the
15 bargain with the government that was made by the
16 inventors disclosing to the world what their invention
17 was. Someone could then come along, look at that,
18 benefit from it, and say, I'm going to make an
19 improvement on it.

20 There is an expression that many patent
21 attorneys have, and it was quoted by one of the chief
22 judges of one of the courts that hear all the patent
23 appeals, and he said, "Only God creates from nothing."
24 If you think about it, that's quite true with respect
25 to something -- it's rare that something is wholly

1 new. What happens is somebody came along, came up
2 with an invention. Someone looked at it and could see
3 their whole disclosure and could say, Hey, I can build
4 a better mousetrap.

5 In fact, when I was thinking about this last
6 night, I noted that even some of the inventions that
7 are the most useful, that are the most eloquent, can
8 be very simple. If I can just refer you back to that
9 juror notebook. You will note there are a number of
10 yellow tabs on it, Pos-it tabs. The Pos-it tab, the
11 Pos-it note, is an invention. In fact, there are more
12 than 60 patents or variations on it. What is it?

13 It's a very simple plastic adhered with a glue that's
14 not very effective, but it can be reapplied and
15 repositioned and used over and over again.

16 In fact, I kind of enjoy it's name. In the
17 Patent Office that issued the first one called it a
18 repositionable pressure sensitive adhesive sheet
19 material. That's the patented name for the Post-it.

20 As I say, it's simple, it's elegant, it's
21 useful, and it has many patents on it. I can tell you
22 personally as a lawyer I can hardly get through a day
23 without having to use a Pos-it in its various
24 combinations.

25 Another example about improvement is it's in

1 our common knowledge or common vernacular that Edison
2 invented the lightbulb. Everybody understands that.

3 Well, Edison didn't start working on
4 lightbulb technology until 75 years after lightbulbs
5 had been in existence. In fact, Edison's patent that
6 became famous was actually called "an improvement on a
7 filament for an electric bulb."

8 Now, what had happened was Edison came along
9 and saw that a lot of the prior art that was out there
10 was inadequate. Why was that? The filaments would
11 burn out very quickly. And so what Edison said was in
12 order to make an improved lightbulb, I need filaments
13 that don't last hours; they last days, even weeks,
14 hundreds of hours.

15 Edison didn't invent the glass bulb. He
16 didn't invent electricity. He didn't invent many of
17 the things that are part of a lightbulb, but his
18 improvement for the filament, that simple improvement
19 made the invention suddenly new and useful and novel
20 and patentable.

21 Second, I think, going back to that first
22 patent on potash, it talked about methods. So patents
23 can be obtained for methods of doing things.

24 What's a method? A method is really a
25 process or a step. One famous method patent was a

1 patent from the 1940s called "Method for Vulcanizing
2 Rubber." By vulcanizing rubber, you made it stronger,
3 last longer. That is a patent of Good Year. And that
4 was a patent that became very valuable.

5 The third point I wanted to make was patents
6 can be obtained for products or sometimes they are
7 called apparatuses. Or in this instance, we're going
8 to be talking about an actual system. This is a
9 software system.

10 So this burden that we have to show
11 infringement, how do we do this? Well, as the video
12 indicated, and I believe the Judge emphasized, a
13 patent really is this right to exclude. Think of it
14 like a deed to real estate, a deed to property because
15 a patent is a property right. And just like any deed
16 to real estate, which defines the boundaries of your
17 right, infringement is like a trespass on that
18 property.

19 That trespass doesn't have to be intentional.
20 We don't have to show that they did it knowingly. We
21 don't have to show that they did it willingly. They
22 can even do it unknowingly. Just think if you had a
23 tract of land and you went away for a few weeks and
24 you came back and somebody had built a house on your
25 property. That's a trespass on your property. They

1 had no right to go there. You have a right to exclude
2 them. And that's exactly what we're saying here.
3 Lawson is trespassing on our property right and we
4 want them to get off.

5 So how does Lawson infringe? Well, with
6 respect to this software we've been talking about,
7 they do it two ways. They do it by making, using,
8 selling and offering for sale this software I've been
9 talking about. And they provide these systems and
10 services to their customers. That is an infringement
11 under the patent laws.

12 They also do it another way that the Judge
13 referenced, which is by inducing or contributing
14 others to infringe our patents. The others in this
15 instance are going to be Lawson's customers in the
16 simplest format.

17 When the customers use the system, they are
18 practicing the processes of some of these method
19 claims I'm going to be talking about in a short while.
20 And what Lawson does is, one, it gives them the
21 instrumentality to do that infringement by using the
22 system. And then it encourages them and provides them
23 with aid and assistance by implementing it, by
24 servicing it, and by providing other assistance that I
25 will get to in a minute.

1 So if we could just go back to the patent for
2 a minute, Mike. I'd just like to emphasize this
3 priority date of August of 1994.

4 Now, when you consider the evidence in this
5 case, you can't do it from the perspective of sitting
6 here in 2011. You have to put yourself back in
7 context. In fact, one of the things that I believe
8 will be emphasized at the end of this case is you
9 can't look at obviousness now through a prism of 2011
10 and through hindsight recreate what happened and what
11 occurred back in 1994.

12 And it's difficult to do that because
13 technology today moves so quickly. The technical
14 world of 1994 was very different. There were no
15 iPhones, no iPods, no iPads, no iTunes. There were --
16 Google did not exist in 1994. It was not founded
17 until 1998. Ebay didn't exist either. It was not
18 founded until 1995. Amazon didn't exist.

19 We just came off the holiday season. And if
20 anybody was like my wife, she spent a lot of time
21 online spending a lot of money purchasing things for
22 family and loved ones. That seems so common place
23 today, but if you go back into the world of 1994, it
24 certainly was not, and that's what we believe we're
25 going to be able to demonstrate to you.

1 For example, the computers back then were
2 primitive. They were bulky. They were slow. They
3 didn't have what we call graphical user interfaces,
4 the kind of things you see now when you go to an
5 Amazon site or when you go to a Google site and just
6 enter in keywords in order to do searches.

7 Throughout this trial, you're going to have
8 to try and place yourself in what was the state of
9 that technology back at that time. So let me just
10 emphasize a few things with respect to some of the
11 claims. If we could go to just representative Claim
12 3. If you want to just the color demonstrative of
13 '683.

14 This is one of the system claims that are
15 going to be at issue in this case. Now, as the Judge,
16 I believe, pointed out, in this instance it has six
17 elements. They have color coded them so they are
18 easier to read.

19 In order for us to establish infringement,
20 we're going to need to show that as properly construed
21 by the Court, the Lawson system that is at issue here
22 has all six of these elements, and we believe that
23 we're going to be able to do that.

24 Again, this is directed to the actual Lawson
25 accused S3 system. So it's going to have to have at

1 least two products catalogs. Just at least two. If
2 it has two, it satisfies it. If it has more, it also
3 satisfies that element.

4 It's going to have to contain data relating
5 to items that are associated to sources. Sources, as
6 the Court told you, include the vendors, manufactures,
7 or other suppliers that provide this.

8 You're going to be able to have to select the
9 product catalogs you want to search. We're going to
10 show you through the evidence a variety of ways that
11 you can do that on the Lawson system.

12 Once you have selected the catalogs, you're
13 going to have to have a means for searching for those
14 matching items in those product catalogs. You then
15 can build a requisition using the data that you got
16 back from doing that search of those product catalogs.
17 And then you're going to have to have the ability to
18 process requisitions, to generate one or more purchase
19 orders, which is another valuable aspect of the
20 invention because if I have multiple vendors, I want
21 to generate multiple purchase orders to go out to the
22 different vendors in order to bring back the goods
23 that I desire.

24 The last step in the system claim is called
25 means for converting data related to a selected item

1 and an associated source to data relating to an item
2 in and a different source. That sounds a little bit
3 complicated, but it's also been construed by the
4 Court. And what this really is back in 1994 was a
5 recognition by the inventors that doing a kind of
6 comparison shopping, is what we call it today, looking
7 at a vendor that's selling one product perhaps at one
8 price, and looking at another vendor that's selling
9 another product or is selling the same product or an
10 equivalent product at perhaps a lower price, the
11 customer can make an informed decision as to what they
12 want to purchase and can select the item from the
13 vendor that are perhaps has the lowest price or
14 perhaps has the item available in inventory, whereas
15 the other vendor did not.

16 So there are some claims here that have been
17 made with respect to these patents by Lawson as to why
18 they should be invalid. And I'm going to come back to
19 that with a little bit more specificity here, but at a
20 high level I just want you to consider for a moment
21 that on three occasions the Patent Office has granted
22 these patents. They have granted 79 claims on those
23 three occasions. And according to Lawson, that was
24 all a mistake and that was a mistake made 79 times.

25 One of the mistakes that they are going to

1 assert, if I can go back to the '683 patent, is that
2 there was a prior art patent. Let me go to column 1
3 of the '683 patent. You will see when you go through
4 these patents that the way we're going to be looking
5 at them is there are a number of numbered columns at
6 the top. There's column 1, there's column 2, and down
7 the middle there will be a number of line numbers, and
8 there will often be reference to column 1, lines 5
9 through 10, for example, if we want to illustrate
10 something, and that will help orient you to where in
11 the patent that I'm going to want you to focus on or
12 maybe one of the experts is going to want to direct
13 you to.

14 But one of the contentions that Lawson makes
15 concerning invalidity is if you go to and highlight
16 for me, Mike, column 1, lines 10 through 17, if you
17 can blow that up, is that this patent identified here
18 as United States Patent 5712989 filed in April of 1993
19 was never identified to the Patent Office.

20 Now, what you're going to hear in this patent
21 which is directed to a RIMS system, which I'm going to
22 discuss in a minute, it's called a requisition
23 information and management system, was actually a
24 patent developed by two of the inventors that were
25 involved here; Mr. Momyer, I introduced you before,

1 and Mr. Johnson. And it was a method. It was a
2 product and method for managing Fisher-Scientific
3 inventory such that they could try and fulfill their
4 inventory needs of their client by selling Fisher
5 products.

6 Now, the continuation is made here that the
7 Patent Office was unaware of that. I would suggest to
8 you that it is in the very patent directly in the
9 background of the invention. And it even says
10 underneath it that the disclosure is incorporated
11 herein by reference.

12 Now, you may also recall -- it was a lot of
13 information in that video, but you may also recall
14 that one of the things the narrator said was how you
15 disclose a patent was to put it in your application
16 and put it in your specification.

17 Here it is. And I've gone through and I've
18 counted. It's referenced no less, in its structure
19 and functionality, referenced no less than 52 times,
20 but at some point in time the suggestion is going to
21 be made by one of Lawson's experts is that they were
22 unaware of this patent and that this patent in
23 combination with some other alleged prior art would
24 invalidate or render the claims obvious.

25 One of those other pieces of prior art they

1 are going to reference was a document viewer program
2 that my inventors, the inventors you're going to hear
3 from, went out and identified and used as part of a
4 tool to build what became this electronic sourcing
5 procurement patent.

6 Again, if you can go to column 4 of the same
7 patent. Specifically, starting at line 5 through 9.
8 Just highlight that.

9 Here, in fact, it indicates that preferably,
10 but not necessarily, this Technical Viewer 2 search
11 program available from IBM is used as a search program
12 in this invention.

13 So the inventors actually told the Patent
14 Office in no uncertain terms that you could use
15 aspects of this RIMS system that the inventors
16 developed with aspects of this TV2 system, which they
17 actually went out and contracted with IBM as a
18 work-for-hire in order to have it included pursuant to
19 their specifications in the overall invention that
20 they ultimately decided on.

21 The suggestion now is that somehow this RIMS
22 system and TV2 system in combination or alone
23 invalidates the patents and the Patent Office could
24 not have been aware of it.

25 Well, the Patent Office, as the video

1 indicated this morning, is required to review this
2 specification, required to review this application,
3 and determine in the face of it whether or not it is
4 patentable.

5 So we certainly think it was no mystery to
6 the Patent Office that these inventors considered
7 these to be tools that would help them make a
8 commercial embodiment of their inventions.

9 In fact, they worked towards that goal. They
10 really made a prototype of this first invention. They
11 didn't have to. You don't really have to make a model
12 or a prototype. All you have to do is disclose to the
13 Patent Office what your invention is and you're
14 entitled to get a patent if it is new, useful and
15 nonobvious.

16 If I could just go to claim 26 of the '683
17 patent. This is a method claim that I wanted to
18 identify. It is always a claim that is being asserted
19 in this case. You may recall I indicated a method
20 claim is sort of a process or if you think about it,
21 the sort of steps of doing something. A good
22 comparison might be it's kind of a recipe for
23 achieving an outcome or a result.

24 If I had a method of making or baking an
25 apple pie, I might have the steps of taking the flour

1 and mixing with the eggs and some water. The next
2 step rolling the dough. The next step putting in the
3 apple filler. The next step putting it in the oven
4 and baking it for 45 minutes at 325 degrees. You can
5 probably tell I haven't made too many apple pies, but
6 the point is it's the steps of performing a process.

7 So who is doing the steps in this instance?
8 The steps are being performed in this case by the
9 customer who's using the Lawson system because the
10 customer maintains on the system at least two product
11 catalogs.

12 The customer selects the product catalogs to
13 search. The customer then searches for those matching
14 items. The customer can build a requisition, and the
15 customer can process the requisition.

16 In this case, we have an additional aspect of
17 the invention was in some configurations, you can
18 actually determine whether an item you selected is
19 available in inventory.

20 Now, you can imagine that can be very useful
21 if I want to buy that product from one vendor and not
22 from another.

23 So an example of a product claim or the
24 system claim is like the manufactured product or
25 system we talked about, like the electric lightbulb as

1 we mentioned before.

2 Now, there are also what you will see in this
3 case what are called dependent claims. I just want to
4 briefly go into those. I think maybe the best way to
5 explain that is to use that model patent, which was
6 for the three-legged stool. If you go to the very
7 last page, the claims appear -- and let's just focus
8 on Claim One for now. If you can put that together
9 for me, Mike, I'd appreciate it.

10 So this is claiming a product or an apparatus
11 on this three-legged stool. And you'll see patent
12 attorneys don't always appear to writ in the clearest
13 of terms, but this is important for a few points I'd
14 like to make. First it says it's an apparatus
15 comprising.

16 Now, you're going to see that word
17 "comprising" in many of the claims that are going to
18 be at issue here. Now, what does that mean in terms
19 of the issues you have to deal with? Comprising means
20 it has to have all of the steps that were identified
21 in the claim, but it can have additional steps or it
22 can have additional elements.

23 For example, if we had an invention that has
24 six separate structures, A, B, C, D, E and F, and I
25 have all those, but I add G and H, that does not avoid

1 infringement because by use of the term "comprising"
2 what it's really saying is it has to have at least
3 these six elements, but it can have additional
4 elements, and you don't avoid infringement simply by
5 adding additional elements.

6 So that term "comprising" is going to be very
7 important when we look at some of the issues in this
8 case.

9 Secondly, you'll see when it's talking about
10 the legs of this stool that's at issue, the second
11 paragraph starts out, it says, Has to have at least
12 three elongated members. Now, if you'll look back at
13 the figure that's in this model patent, in figure 1
14 there's actually a figure, a drawing, of the
15 three-legged stool.

16 You also see in figure 2 that there's a
17 drawing of a four-legged stool. Now, there may be
18 advantages to a three-legged stool and there may be
19 advantages to a four-legged stool, but when you claim
20 something, if you can go back to that Claim One again,
21 as something that has at least three elongated
22 members, in this instance the legs we've been talking
23 about, a product with four legs still infringes this
24 claim.

25 Why is that? Because a stool with four legs

1 still has at least three legs. So, again, you can't
2 avoid infringement simply by adding additional
3 elements.

4 I mentioned this dependent claim I wanted to
5 talk about. And there's an example in Claim Two of
6 this model patent. What this says, and I won't read
7 the entire claim, but it says, "An apparatus
8 according to Claim One," and then it says, "further
9 comprising," and it goes on to talk about additional
10 requirements for this Claim Two.

11 Now, this is what's known as a dependent
12 claim. And I just want to make sure we understand
13 that because there are going to be some dependent
14 claims that are coming up at issue in this case. When
15 it says it's an apparatus according to Claim One, and
16 then it has additional elements, what's necessary is
17 that it has to have all of the elements of Claim One
18 and then you add this additional element.

19 So, in other words, if Claim One, let's just
20 say, had four elements, and Claim Two said there was
21 one additional element, then you would have to have
22 the four elements of Claim One as well as the
23 additional element of Claim Two.

24 I know it's a little confusing, but patent
25 attorneys like to do this and draft claims in this way

1 so they get the broadest possible protection for the
2 inventors. But you don't want to always have to claim
3 something as broadly as possible because that
4 sometimes makes a claim too broad. You'd like to
5 approach it from several different perspectives.

6 So who is ePlus, this Herndon, Virginia,
7 company? And what is its business line? Well, it has
8 two main operations. It's an equipment leasing and
9 sales division, which is not at issue in this lawsuit,
10 and it has this business software solutions side of
11 its business, which includes the electronic sourcing
12 and procurement products that we talked about that
13 Mr. Farber who is the president of ePlus will talk
14 about.

15 EPlus has about 650 employees. It has a
16 market cap. It's known as its share price times the
17 number of shares. It was about \$190 million last
18 year. Besides its main headquarters in Herndon,
19 Virginia, it has about 20 other offices throughout the
20 United States.

21 EPlus Systems is a successor of a company
22 that was part of all company which was
23 Fisher-Scientific where these inventors first
24 conceived their inventions and created them back in
25 1994.

1 And we're going to be talking about those
2 inventions and the applications that were filed at
3 that time on these early processes.

4 Now, the fact is there is going to be a lot
5 of discussion in the patent as to how they put
6 together the invention back in 1994, but that's not
7 important. That supported the fact that the Patent
8 Office recognized they had something new and useful
9 and not obvious. And then they claimed it.

10 Now, the fact is, as I said before, it's the
11 claims we're all going to have to focus on because
12 it's those claims that define what is, in fact, at
13 issue in this case and whether if indeed Lawson
14 infringes.

15 Now, have these patents been successful for
16 ePlus? They have been enormously successful. Since
17 they were acquired as part of this acquisition from a
18 company that Mr. Farber was at, at ProcureNet, in
19 2004, they have now received almost \$60 million in
20 royalty revenues associated for licensing these
21 patents to five separate companies including SAP, one
22 of the largest manufacturers of software in the world,
23 and a company known as Ariba.

24 Now, to be sure, ePlus has had to enforce its
25 rights sometimes in court in order to have others

1 respect their intellectual property laws and their
2 property rights. And that's why we're here today.
3 Because we filed this lawsuit now almost two years ago
4 and Lawson has refused to stop practicing our
5 inventions and has refused to pay us a license in
6 order to so. And so those are some of the issues that
7 need to be addressed here by you over the course of
8 the next several days.

9 So who is Lawson Software? They are based in
10 St. Paul, Minnesota. They have 3900 employees
11 worldwide located in over 26 countries. Last year
12 they had a gross profit of \$450 million. They are
13 about --

14 MR. McDONALD: I object. The financial
15 information was excluded from this case.

16 MR. ROBERTSON: It's publicly-available
17 information.

18 THE COURT: I don't care whether it's
19 publicly available or not. There are no damage issues
20 in the case. I think it's time for you to address the
21 question of infringement.

22 In fact, I'm about ready to do this: You
23 finish up on infringement. You talk about
24 infringement and when we get to the invalidity part of
25 the case, you can open on infringement, and you can

1 have an opening there. Why don't we do it that way?
2 That will make it easy for you to deal with, won't it?

3 MR. ROBERTSON: You mean in response, Your
4 Honor?

5 THE COURT: Yes. What about that? There's
6 been a lot of what I would have given by way of
7 instructions at the end of the trial. I haven't heard
8 anything about infringement yet.

9 What do you think?

10 MR. McDONALD: They've been talking about
11 invalidity. So I'd like a chance to respond to that.

12 THE COURT: I know, but I'm wondering if you
13 don't want to wait and do it when it's all fresh in
14 everybody's mind. I'm not going to force that down
15 your throat because he's been doing that, but it
16 occurs to me it might be in everybody's interest to do
17 it fresh. I'll let you think about it.

18 MR. McDONALD: We appreciate that. If we can
19 talk about it over lunch.

20 THE COURT: Go to infringement. That's what
21 your responsibility is.

22 MR. ROBERTSON: Sure. Let me talk about some
23 of the building blocks that are going to be at issue
24 here in this case. As I said, Lawson has a number of
25 software programs or what will be referred to as

1 modules, and they build upon each other.

2 So you're going to hear about the Lawson
3 system of foundation, which is basically an
4 environment which allows these components we're
5 talking about such as purchase orders and
6 requisitions, and the ability to go out to online
7 websites, it's the basic foundation upon which all of
8 these other programs or modules will operate.

9 You'll also hear about this process of
10 loading the software, which is used to create work
11 flows between the applications such as to get
12 requisitions approved, you would need this process
13 flow.

14 There's also going to be several other
15 modules that are actually called purchase orders,
16 requisitions, and inventory control. Requisition
17 sounds exactly like you would think. It's the
18 component that allows you to build the electronic
19 requisitions to request or order items.

20 The purchase order module or program is that
21 component that permits you to generate the purchase
22 orders that are at issue in this case. The inventory
23 control module or program lets you load the vendor
24 catalog data into your system so you have that data
25 available to search and select.

1 You're also going to hear about something
2 called Requisition Self Service. It's a Lawson module
3 program. It is simply a sort of user friendly overlay
4 to permit large scale use of the invention.

5 For example, you want to have 500 people at
6 your company be able to do purchasing and procurement
7 on the system. So all of these can be configured
8 together in a variety of different ways, which Dr.
9 Weaver will explain, in order to build and form the
10 infringing system that's at issue here.

11 So Lawson's own documents will confirm that
12 you can import vendor catalog containing the
13 information about the vendor items. Its documents
14 will confirm that the vendor item information can be
15 categorized, that it can be searched by keyword. It
16 can be given code identifications.

17 You'll see an actual demonstration. There
18 will be four different demonstrations illustrating the
19 point about how you can conduct these searches, how
20 you can generate order lists, how you can create
21 requisitions, how you can then build requisitions and
22 then generate one or more purchase orders to various
23 vendors.

24 There will also be description of what's been
25 referred to as Lawson Punchout procurement. What

1 Punchout is is that software allows you to go out over
2 the Internet and go to different vendors that might be
3 available. For example, Lawson has a number of what
4 they call Punchout partners.

5 You just might imagine one Punchout partner
6 could be Office Max, for example, and one Punchout
7 partner might be Office Depot. And a user of the
8 Lawson software might want to be able to buy
9 paperclips and might want to buy them in volume. And
10 they might want to see if they are available at Office
11 Max or available at Office Depot, and that through
12 this software they can actually go and visit a
13 specially created website, a website created to
14 Lawson's specifications, and determine whatever items
15 they want that are available from that vendor. If
16 they are there, they can put them on their order list
17 and retrieve them back to the Lawson software
18 environment and build their requisition there and
19 generate their purchase orders.

20 That even gives them the ability in most
21 instances, and you'll see examples of this, to
22 determine whether or not that the item that they are
23 looking for is available in inventory.

24 So you'll see during the infringement case
25 that Lawson's S3 system has the ability, the

1 capability, to have multiple vendor catalogs with
2 product data from multiple sources. The catalog data
3 and contents can be loaded for searching. You can
4 choose the users, you can, through cooperation with
5 Lawson choose their own Punchout partner catalogs that
6 they want to have ability to.

7 You will see that the Lawson system can
8 select the product catalogs to search by a variety of
9 different ways. They can use particular keywords or
10 exact phrases. They can perhaps use a particular
11 supplier part number or a manufacturer part number.
12 It could perhaps use and restrict the price ranges or
13 it can use product types and categories. It can drill
14 down and get to where you want.

15 There are all these various methods for
16 performing this step or performing the functionality
17 of selecting how you're going to conduct the search.

18 You can search for the matching items by
19 retrieving those records in the database, and then you
20 build the requisition using that requisition module I
21 mentioned, and you can process those purchase orders.

22 The only other thing I wanted to briefly
23 mention was this notion of inducement or contributory
24 infringement the Judge mentioned. I'm not going to
25 instruct you on what the law is right now. I just

1 want to tell you what we think the facts are going to
2 be and the evidence is going to be.

3 So how does Lawson assist or aid or abet or
4 encourage or influence or urge the inducement or what
5 is known as the indirect infringement of these
6 patents? As I mentioned, it's the very customers they
7 sell their products to.

8 Now, this inducement or this indirect
9 infringement under the patent laws is no less an
10 infringement. You can't go out and encourage and urge
11 and assist someone else to infringe. So when the
12 customers use the Lawson system in the way that it's
13 capable of performing, they have induced that
14 infringement. And as they say, it's no less an
15 infringement, notwithstanding it's often referred to
16 as indirect infringement.

17 So what is the evidence that Lawson
18 encourages its customers to configure their software
19 and perform the patented functions here?

20 Well, the evidence will be that they actually
21 provide you with the catalog content. That's one of
22 the services they offer and they will implement, and
23 there will be evidence that they have done that.

24 They also provide customer support in other
25 implementation. They'll come and they'll spend months

1 at a time building a system right at your facility.
2 Then they'll maintain that system and provide you with
3 updates and software fixes when you need them.
4 They'll give you educational and training materials,
5 manuals, guides. They'll provide help screens.
6 There's a Website you can go to for 24/7 assistance.
7 And what they do for this maintenance and this
8 implementation services is they charge you tens of
9 thousands, if not hundreds of thousands of dollars for
10 the very service they are providing in order to induce
11 this infringement. And that will be the evidence
12 you'll hear on that.

13 So our evidence will be that you'll hear from
14 the three inventors. You'll hear from Mr. Farber, the
15 president of ePlus Systems. You'll hear from Elaine
16 Marion, the CFO of ePlus. You'll also see and you'll
17 have in evidence the patents and other supporting
18 documents including what's alleged to be the prior
19 art. And you'll have all these Lawson documents I
20 just mentioned, the marketing materials, the manuals,
21 even the representations that they make to their
22 potential customers as to how their software operates.
23 And that's very important because in this process when
24 Lawson goes out to try and sell this product, the
25 customers say, Well, what can it do? And they'll ask

1 a number of questions about what its capability are.
2 And these are what are called requests for proposals.
3 That is, it's an RFP. The potential customer is
4 asking Lawson, What can this software do for us? And
5 what Lawson does is it responds to these RFPs.
6 Indeed, it has an entire library with canned responses
7 as to what it says the functionality can be. And the
8 testimony will be that these responses were actually
9 invented by their legal department and their engineers
10 in an effort to make them as accurate as possible.

11 And Dr. Weaver has gone through and looked at
12 all these representations as to the features and
13 functionality that the product has, and using these
14 representations, using these admissions that they try
15 to make as accurate as possible, the testimony will
16 be, we'll be able to show that Lawson itself has that
17 capability. And Dr. Weaver will show that, and he
18 will also show the demonstrations.

19 Mr. Niemeyer will explain how the Lawson
20 source code confirms that the systems that Dr. Weaver
21 has opined they infringe has that functionality. As I
22 said, you'll hear testimony from Lawson management and
23 from its customers.

24 So with that, what is Lawson going to say in
25 response to the infringement case? Well, one of the

1 things they are going to say is, We don't sell it
2 initially with the catalogs.

3 Well, that may or may not be true in every
4 instance, but what they do do and what the evidence
5 will be is they'll certainly come along and they'll
6 load it with the catalog data they want, and that's a
7 service they offer. And, remember, offering for sale
8 is infringement.

9 They will transfer your old data from an old
10 system onto the new system so it's got all the catalog
11 content. Or they'll put whatever catalog content you
12 ask them to put on it. And, of course, they charge
13 for all those services.

14 So this argument that we don't sell it right
15 out of the box with the catalog content really is not
16 meaningful. In fact, you'll see none of the claims
17 require that the system be sold out of the box with
18 respect to the catalog content.

19 They'll also talk a little bit about their
20 inability to do this comparison shopping aspect I
21 talked about or cross-referencing or they'll say their
22 customers -- well, the system can do it, but our
23 customers really don't use it much.

24 Well, again, that's not a defense to
25 infringement. You can't sell a product and say, Well,

1 it has the capability of doing it, but our customers
2 just don't want to do that a lot. It's like saying, I
3 could sell a car with infringing windshield wipers,
4 but I just never turn them on. So that's not an
5 infringement. Well, if the product is sold with the
6 capability of doing it, that is infringement.

7 So, Your Honor, with that I have concluded my
8 issues with respect to infringement. As I understand,
9 I would like to address some of the issues on
10 invalidity after Mr. McDonald has an opportunity to
11 speak to the jury.

12 Is that what I understood Your Honor to be
13 suggesting?

14 THE COURT: I want to know if he wants to
15 agree to that?

16 MR. McDONALD: He already went into
17 invalidity. He should finish his opening statement.

18 THE COURT: Finish your statement. I'm not
19 sure that's how we're going to try the case, but we're
20 going to finish it.

21 MR. ROBERTSON: Let's talk a little bit about
22 invalidity because the case now is raised with respect
23 to what are going to be called six prior art
24 references. Four of those six were considered by the
25 Patent Office. Two of them I already referenced to

1 you being that RIMS system and the TV2 system.

2 They represent either alone or in isolation
3 or in combination, those references invalidate all 12
4 of the patent claims that are at issue.

5 We believe the evidence will show exactly the
6 opposite, that the Patent Office was fully aware of it
7 and that the RIMS system is radically different from
8 what the patented system is. And that can be
9 explained by at least two of the inventors who were
10 responsible for and were the named inventors on the
11 RIMS system.

12 There are two other systems that are going to
13 be identified. One is called the J-CONN, which was
14 essentially a parts ordering inventory system in our
15 view, and our expert will address how it doesn't have
16 all the elements of the claims.

17 Indeed, Lawson admits that it doesn't
18 anticipate any of the 12 claims that are at issue
19 here. In other words, it doesn't have all of the
20 elements.

21 Another system that they'll be raising is
22 called P.O. Writer, which we really think was simply
23 nothing more than a sort of electronic form filler for
24 purchase orders. And Lawson even admits that it
25 doesn't anticipate or have every element of nine out

1 of the 12 claims here.

2 So what they need to do is then try and put
3 together what's known as an obviousness case. To say,
4 Well, a person of ordinary skill in the art back in
5 1994 would have somehow known to take the J-CONN
6 system and combine it with the P.O. system and take
7 the J-CONN system and combine it with some other
8 patent they are going to point you to, and then really
9 in hindsight make up the invention that was conceived
10 of and reduced to practice back in 1994.

11 We think the analysis done by their expert on
12 that is going to be significantly lacking. And,
13 indeed, it's interesting to note that even their
14 expert concedes that he doesn't even agree with
15 Lawson's lawyers on how the invalidity should be put
16 together. So I gather that reasonable minds in that
17 respect can differ.

18 So I think, Your Honor, with that I would say
19 thank you. I think the bottom line is that the
20 evidence will show that Lawson infringes and that the
21 patents are invalid, and we would respectfully ask
22 that you return a verdict of infringement at the end
23 of the evidence. I thank you for your attention.

24 THE COURT: We'll take our lunch recess for
25 45 minutes. It will probably be closer to an hour by

1 the time I talk to the lawyers.

2 All right. You can take your pads with you
3 if you would. Put your names on them.

4 (The jury is out.)

5 THE COURT: Anything we need to go over?

6 MR. McDONALD: Your Honor, in response to
7 your question I would like to do my opening about
8 validity and infringement.

9 THE COURT: Well, if you want to. I
10 understand the need to cover these things in opening
11 statement, but there was so little said about
12 infringement I got the idea that basically it was a
13 closing argument on invalidity.

14 So you can do it, but I'm wondering whether
15 it's not better to just try the case on the issues of
16 invalidity, let the jury return a verdict -- I mean of
17 infringement. Let the jury return a verdict on
18 infringement or not. And then we'll try the
19 invalidity case. After hearing the statements and the
20 way you-all are proceeding. Why isn't that the best
21 way to proceed now, Mr. Robertson?

22 I don't think you have it within you to
23 fragment the case the way it's supposed to be. You
24 had nothing to say about invalidity in your opening
25 part of the case. None. It's not your business.

1 It's not what you're hear to prove. And I don't want
2 to hear anything about it.

3 And you-all are getting things so commingled,
4 you're going to get the jury confused. I now after
5 listening to the opening statements have come to the
6 conclusion that's really how we ought to try the case
7 and just let the jury have the instructions and
8 verdict on infringement and then try the invalidity if
9 they return an infringement finding. If they don't,
10 the case is over.

11 I think you-all ought to think about that.
12 It seems to me as if I've told you before how the case
13 needs to be tried, that you don't anticipate or put on
14 all your evidence in anticipation or *in apprehendo* and
15 then come back and try to do it again. We're not
16 going to do it that way.

17 I thought I told you that from the very
18 beginning of the case. It looks to me like maybe
19 you're going to have to think about that at the lunch
20 hour.

21 MR. McDONALD: Your Honor, during the opening
22 statements of Mr. Roberson, he made statements saying
23 that the RIMS prior art was considered by the Patent
24 Office. That's directly contrary to a statement by
25 the Patent Office on the reexams of all three patents.

1 THE COURT: Look, if it was in the patent, if
2 was in the patent, they're bound to have considered
3 it.

4 MR. McDONALD: It was not in the information
5 disclosure statements. It was not identified as to
6 references cited --

7 THE COURT: How did it get in the
8 specification?

9 MR. McDONALD: They wrote it in there. What
10 he was talking about, he showed them the issued
11 patent, but as filed, it didn't show the patent number
12 on it.

13 THE COURT: Well, somehow in the process it
14 got in there, and I don't care what they found there.
15 Somehow the Patent Office issued a document that had
16 actually in it the RIMS system.

17 You tell me they didn't consider it even
18 though they put it in there?

19 MR. McDONALD: There's a new issue raised by
20 the reexams because of the RIMS prior art because they
21 found, the Patent Office found, in the re-exams that
22 it was not --

23 THE COURT: We're not going to deal with the
24 reexams and maybe this is an example where the Patent
25 Office is all wet. When the Patent Office puts in the

1 specification something that says you have a patent on
2 this, to let them then come back in here and say,
3 Well, we didn't consider it is almost farcical.

4 MR. McDONALD: There's a procedure for
5 disclosing prior art. Very easy process. Put it on
6 your disclosure statement. They didn't do it. That's
7 why it didn't show up on the cover page of the patent
8 under the references cited. TV/2 is in there too, but
9 they also disclose the prior art as references cited.

10 THE COURT: That looks to me like an excuse
11 for doing a sloppy job at the Patent Office. I'm not
12 dealing with the reexamination. I'll have to deal
13 with the other issue later.

14 All right. We'll be in recess. Since I've
15 kept you this long, we'll take an hour from the time I
16 let the jury go.

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